

Application No. 09/923272
Page 4

Amendment
Attorney Docket No. D55.2B-10027-US01

Remarks

Applicant herein is requesting the immediate correction of an incorrectly issued Abandonment in Application Serial No. 09/923,272.

On September 30, 2002, an Office Action was issued by the United States Patent Office.

On January 29, 2003, Applicant filed by facsimile a response to the Office with a one month Petition for Extension of Time along with the appropriate fee. The Office Action was received by the United States Patent Office as evidenced by the United States Patent Office Auto-Reply Facsimile Transmission. Applicant is enclosing herein for consideration copies of the following documents:

1. Facsimile transmittal letter dated January 29, 2003, (indicating transmittal of 11 pages);
2. Facsimile transmission receipt dated January 29, 2003;
3. Amendment and remarks dated January 29, 2003, (8 pages);
4. Petition for Extension of Time with Credit Card Payment dated January 29, 2003, (2 pages);
5. Patent & Trademark Office Auto-Reply Facsimile Transmission receipt dated January 29, 2003, (1 page);
6. Notice of Abandonment for failure to respond to the Patent & Trademark Office Action of September 30, 2002.

The enclosed copies of documents attached herein clearly show that the Applicant properly responded to the Office Action of September 30, 2002, where said proper response was filed within the Patent Office on January 29, 2003, with the appropriate Petition for a One Month

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Amendment
Attorney Docket No. D55.2B-10027-US01

Extension of Time and Petition Fee. Applicant's office shows the facsimile transmission receipt of the enclosed documents by the Patent & Trademark Office. The Patent & Trademark Office Auto-Reply Facsimile Transmission shows receipt of Applicant's response by the Patent Office on January 29, 2003.

It appears that the Facsimile Transmission of Applicant's Amendment and Response of January 29, 2003, never arrived with the application file Serial No. 09/923,272 herein.

It is clear that the Notice of Abandonment dated October 4, 2004, has been incorrectly issued in this proceeding. Correction is earnestly solicited. Applicant requests that the application be placed into an active status.

Respectfully submitted,

VIDAS, ARRETT & STEINKRAUS

Date: 10-28-, 2004

By: 

Edwin E. Voigt II
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RESULT OK

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: E. Wendell Diller
Application No.: 09/923,272
Filed: August 3, 2001
For: ELONGATE VENTED GUN BARREL
Examiner: Michelle Thomson
Group Art Unit: 3641

BOX FEE AMENDMENT
Commissioner for Patents
Washington, D.C. 20231

Docket No.: D55.2-10027-US

FACSIMILE TRANSMITTAL LETTER

TO: Examiner Michelle Thomson
FACSIMILE NO.: (703) 872-9326
GROUP ART UNIT: 3641
TOTAL NUMBER OF PAGES (including cover letter): 11

DATE: January 29, 2003
TIME: 4:15 pm

Dear Examiner Thomson:

Enclosed please find the following documents: 8 Pg Amendment; 1 Pg Petition for Extension of Time; 1 Pg PTO Form 2038; 1 Pg Fax Transmittal Letter.

Please charge any additional fees or credit any overpayment associated with this communication to Deposit Account No. 22- 0350.

Respectfully submitted,
VIDAS, ARRETT & STEINKRAUS

Date: January 29, 2003

By: 

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PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In Re Application of:	E. Wendell Diller
Application No.:	09/923,272
Filed:	August 3, 2001
For:	ELONGATED VENTED GUN BARREL
Examiner:	Michelle Thomson
Group Art Unit:	3641

Box Fee Amendment
Commissioner for Patents
Washington, D.C. 20231

Docket No: D55.2-10027

AMENDMENT AND REMARKS

This Amendment is filed in response to the Office Action as mailed September 30, 2002. Applicant has enclosed herein a Petition for a one month extension of time along with the appropriate fee. In response to the Office Action of September 30, 2002, please amend the application as follows:

In the Claims:

Applicant is presenting amended claims herein for consideration without prejudice. Applicant traverses the examiners initial rejection of claims and applicant intends to pursue the claims as originally drafted, or the scope of the claims as originally drafted, in a continuation application.

Please amend the claims as follows without prejudice:

1. (Amended) A firearm comprising:
 - a) an elongate barrel having a length of at least three feet, said elongate barrel having a breach end and a muzzle end; and
 - b) a plurality of vents disposed through said elongate barrel, said vents initiating beyond twelve inches from said breach end, said vents

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January 29, 2003

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terminating proximate to said muzzle end, said vents having a size less than 1/2 inch in diameter, said vents being constructed and arranged to minimize sound report by gradual release of gasses through said vents along said barrel toward said muzzle end of said firearm following discharge, said vents minimizing gas pressure proximate to said muzzle end.

Please cancel claim 11 without prejudice. Claims 4, 7, 10, 13, 16, and 18 have been withdrawn in response to the previously issued restriction requirement.

REMARKS

Applicant is providing a response to the Office Action of September 30, 2002 by numbering paragraphs herein to correspond to the Office Action.

In paragraph 2, the Examiner has rejected claim 11 pursuant to 37 CFR 1.75(c). Applicant has cancelled claim 11 herein without prejudice. Applicant believes that the amendment herein resolves the cited claim.

In paragraph 4, the Examiner next rejected claims 1-3, 5, 6, 8, 9, 12, 14, 15, and 17 pursuant to 35 U.S.C. §103(a) over Sweetman U.S. Patent No. 2,742,821 and Smith (Small Arms & Cannons 1982).

With respect to 35 U.S.C. §103, the Federal Circuit has set out at least five principles regarding obviousness determinations under §103. *Hodosh v. Block Drug Co.*, 786 F.2d 1136, 229 USPQ 182, 187 (Fed. Cir. 1986). In *Hodosh*, the Federal Circuit stated:

Our comments on the district court's obviousness determination generally include the following tenets of patent law that must be adhered to when applying §103:

- (1) the claimed invention must be considered as a whole (35 U.S.C. 103; see, e.g., *Jones v. Hardy*, 727 F.2d 1524, 1529, 220 USPQ 1021, 1024 (Fed. Cir. 1984) (though the difference between claimed invention and prior art may seem slight, it may also have been the key to advancement of the art));

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January 29, 2003

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- (2) the references must be considered as a whole and suggest the desirability and thus the obviousness of making the combination (see, e.g., *Lindemann Maschinenfabrik GmbH v. American Hoist and Derrick Co.*, 730 F.2d 1452, 1462, 221 USPQ 481 488 (Fed. Cir. 1984));
- (3) the references must be viewed without the benefit of hindsight vision afforded by the claimed invention (e.g., *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1553, 220 USPQ 303, 313 (Fed. Cir. 1983));
- (4) "ought to be tried" is not the standard with which obviousness is determined (*Jones, supra*, 727 F.2d at 1530, 220 USPQ at 1026); and
- (5) the presumption of validity remains constant and intact throughout litigation (35 U.S.C. 285; e.g., *American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1359-60, 220 USPQ 763, 770 (Fed. Cir. 1984)).

Furthermore, when an attempt is made to combine two references A and B, or to change a single reference, a prima facie case of obviousness has not been established if:

- (1) A and B could not or would not be physically combined in an operative fashion to produce the desired result by a person of ordinary skill without use of the patentee's teachings. *In re Lintner*, 458 F.2d 1013, 173 USPQ 560, 562 (CCPA 1972); *In re Regel*, 526 F.2d 1399, 199 USPQ 136 (CCPA 1975); *In re Jansson*, 609 F.2d 996, 203 USPQ 976 (CCPA 1979).
- (2) The intended purpose or function of either A or B, or both, is destroyed by their combination. *In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984).
- (3) No suggestion why or reasons or motivation for combining A and B appears explicitly or implicitly in either A or B, or both in combination. *In re Clinton*, 527 F.2d 1226, 188 USPQ 265 (CCPA 1976). Obviousness can not be established by combining the teachings of the prior art to produce the claimed invention, absent a teaching or suggestion supporting the combination. *In re Fine*, 5 USPQ 2d, 1596 (1988) (Fed. Cir. 1989); see also *In re Laskowski*, 10 USPQ 2d 1397 (Fed. Cir. 1989).
- (4) A and B are from such diverse arts (i.e., either or both are nonanalogous art to the claimed invention) that a person of ordinary skill in the claimed art would not look to those arts to solve the problem treated by the claimed invention. *In re Pagliaro*, 657 F.2d 1219, 210 USPQ 888 (CCPA 1981); *In re Wood*, 599 F.2d 1032, 202 USPQ 171 (CCPA 1979); *In re Horn*, 203 USPQ 969 (CCPA 1979).

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(5) A and B do not teach the source of the problem and the recognition of the source of the problem is what is unobvious. *Eibel Process Co. v. Minnesota and Ontario Paper Co.*, 261 US 45 (1923); *In re Sponnoble*, 405 F.2d 578, 160 USPQ 237 (CCPA 1969); *In re Peehs*, 612 F.2d 1287, 204 USPQ 835 (CCPA 1980). See *Kayton*, 1 Patent Practice 5-28, 29 (1985).

In addition, in the recent case of *In re Dembiczak*, 50 U.S.P.Q.2d 1614 (CAFC 1999), the Court of Appeals for the Federal Circuit has stated that the ultimate determination of whether an invention is or is not obvious is a legal conclusion based upon underlying factual inquiries including:

- (1) The scope and content of the prior art;
- (2) The level of ordinary skill in the prior art;
- (3) The differences between the claimed invention and the prior art; and
- (4) Objective evidence of non-obviousness.

The Court of Appeals for the Federal Circuit went on to state that the analysis with respect to obviousness is required to be conducted "at the time the invention was made" to guard against entry into the "tempting but forbidden zone of hindsight". The Court of Appeals for the Federal Circuit went on to state that the "very ease with which the invention can be understood may prompt one to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher". The Court of Appeals for the Federal Circuit has stated that the case law makes clear that the best defense against the subtle but powerful attraction of a hindsight-based obviousness analysis is the rigorous application of the requirement for a showing of the teaching or motivation to combine prior art references and that one of ordinary skill in the art would have been motivated to select the references and combine them, and it was error to not elucidate any factual teachings, suggestions, or incentives from the prior that showed the propriety of combination. The Federal Circuit in *Dembiczak* further stated that combining prior art references without evidence of such a suggestion, teaching, or motivation simply takes the inventor's disclosure as a blueprint for piecing together the prior art to defeat patentability which is the essence of hindsight.

The Sweetman '821 reference identifies and/or teaches the problem to be

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solved, namely the disadvantage of the shell case becoming mutilated during discharge of a weapon which includes a tapered bore. Sweetman 821 in column 1, beginning at line 40, states: "This mutilation of the case is caused by the formation of a pressure wave in the bore created when the deformable projectile enters the tapered section, producing momentary decrease in velocity thereof.... Since the pressure front is moving toward the muzzle, this momentary deceleration creates a back pressure wave toward the breech which mutilates the case end." The Sweetman '821 reference teaches the solution to this problem in column 2, beginning at line 70 and extending into column 3, which states: "From the foregoing, it will be apparent that when a projectile, not shown, of a caliber corresponding to the caliber of the larger bore section of the barrel is fired through any one of the barrels as shown in Figs. 1, 3, 4, and 5, will, when it passes from the larger bore section, adjacent the breech end of the barrel, and into the tapered section where it is deformed, create a back pressure wave which will be released through the vents located either at the rear end of the tapered section or at the forward end of the rear, straight section. This will prevent the back pressure wave from moving back to the breech of the barrel, not shown, and mutilating the open end of the empty shell case, not shown." The Sweetman '821 reference teaches the use of shock wave ports utilizing relatively large holes proximate to a breech which during operation will add to the noise of the report. The Sweetman '821 reference teaches the sudden release of the highest gas pressure proximate to the breech which will create a shock wave which will, in turn, increase the noise of the report.

The Sweetman '821 reference does not teach or suggest the gradual release of gasses through the porting along the length of an elongate barrel to minimize gas pressure proximate to the muzzle end, thereby reducing the shock wave and noise of the report. The Sweetman '821 reference does not teach this problem nor does the Sweetman '821 reference teach or suggest a solution to the problem associated with minimization of sound report by the minimization of gas pressure proximate to the muzzle end of a firearm. The Sweetman '821 reference does not teach or suggest the release of gasses through the ports of an elongate barrel with port sizes being sufficiently small to prevent the creation of a shock wave at the ports for minimization of sound report.

The Smith reference teaches that the longer the barrel the greater the

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velocity of the projectile. The Smith reference is designed to solve the problem of maximization of muzzle velocity. In addition, the Smith reference teaches the use of silencers which require inner and outer sections and baffles which are restricted by the Department of Alcohol, Tobacco, and Firearms. In both the Sweetman '821 and the Smith reference, muzzle velocity is identified as an important, if not critical, aspect of the firearm. The gradual release of gasses through vents along the barrel to minimize gas pressure proximate to the muzzle end destroys the desired and important goal of maximization of muzzle velocities as required by the Sweetman '821 and Smith references.

The Sweetman '821 reference does not teach or suggest any combination for use with a silencer as taught by the Smith reference. Nowhere within the Sweetman '821 reference are silencers taught, suggested, and/or referenced.

No suggestion, motivation, or teaching is provided in the Sweetman '821 reference for combination with the Smith references cited by the Examiner. No suggestion, motivation, or teaching is provided in the Sweetman '821 reference for combination with any other reference to provide for the features of Applicant's claims as amended herein.

No suggestion, motivation, or teaching is provided in the Smith reference for combination with the Sweetman '821 reference. No motivation is provided within either the Sweetman '821 nor the Smith references to address the same problem to be solved as identified and taught by Applicant herein.

Applicant respectfully asserts that the Sweetman '821 and Smith references may not be combined in an operative fashion to yield Applicant's invention herein. Applicant respectfully asserts that the purpose of the Sweetman '821 reference and the Smith reference related to teaching of maximization of muzzle velocity would be destroyed when combined to attempt to provide Applicant's invention herein. Applicant further asserts that no motivation is present within either the Sweetman '821 nor Smith references to address the problem and solution as identified and solved by Applicant herein. Further, Applicant respectfully asserts that the Examiner has impermissibly utilized hindsight to reject Applicant's claims as amended herein. Applicant further asserts that the examination of Applicant's claims as amended herein are allowable when

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January 29, 2003

Amendment
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examined without the impermissible use of hindsight in view of the Sweetman '821 and/or Smith references.


Applicant has attached hereto a "Marked-Up Copy of the Amended Claims" for consideration by the Examiner. The claims have been amended herein and/or canceled without prejudice.

For the above-identified reasons Applicant respectfully requests reconsideration and withdrawal of a 35 U.S.C. §103 rejection of Applicant's claims as amended herein. Applicant respectfully requests reconsideration and allowance of Applicant's claims 1, 2, 3, 5, 6, 8, 9, 11, 12, 14, 15, and 17 herein. Issuance of an early Notice of Allowance is earnestly solicited. Should the Examiner have any questions concerning this Amendment and remarks, the Examiner is cordially invited to contact the undersigned via E-mail, facsimile, and/or by telephone at the below-identified addresses.

Please charge any deficiency of fees to Applicant's Counsel's Deposit Account Number 22-0350.

Respectfully submitted,
VIDAS, ARRETT & STEINKRAUS, P.A.

Date: 1-29-03

By: 
Edwin E. Voigt
Attorney Reg. No. 36,042

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*Application No.: 09/590,010
January 29, 2003*

*Amendment
Page 8*

VERSION WITH MARKINGS TO SHOW CHANGES TO THE CLAIMS

1. (Amended) A firearm comprising:

- a) an elongate barrel having a length of at least three feet, said elongate barrel having a breach end and a muzzle end; and
- b) a plurality of vents disposed through said elongate barrel, said vents initiating beyond twelve inches from said breach end, said vents terminating proximate to said muzzle end, said vents having a size less than 1/2 inch in diameter, said vents being constructed and arranged to minimize sound report by gradual release of gasses through said vents along said barrel toward said muzzle end of said firearm following discharge, said vents minimizing gas pressure proximate to said muzzle end

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OCT 28 2004

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In Re Application of:	E. Wendell Diller
Application No.:	09/923272
Filed:	August 3, 2001
For:	Elongate Vented Gun Barrel (quite gun)
Examiner:	Michelle Thomson
Group Art Unit:	3641

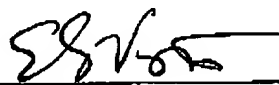
BOX FEE AMENDMENT
Commissioner for Patents
Washington, D.C. 20231

Docket No: D55.2B-10027-US

PETITION FOR AN EXTENSION OF TIME UNDER 37 CFR §1.136

Petitioners, E. Wendell Diller, hereby requests a one month extension of time to respond to the Office Action mailed September 30, 2002. This petition is accompanied by PTO Form 2038 authorizing payment of \$55.00 as set forth in 37 CFR §1.17 and is filed prior to or with the response.

Any outstanding fee for extension should be charged to our Deposit Account, No. 22-0350.

Respectfully submitted,
VIDAS, ARRETT & STEINKRAUS, P.A.Date: January 29th, 2003By: 
Edwin E. Voigt II
Attorney Reg. No. 36042Suite 2000
6109 Blue Circle Drive
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TO: Auto-reply fax to 952 563 3009 COMPANY:

OCT 28 2004

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Auto-Reply Facsimile Transmission

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PATENT AND
TRADEMARK OFFICE

TO:

Fax Sender at 952 563 3009

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1/29/03 5:11:15 PM [Eastern Standard Time]

Total Pages:

11 (including cover page)

ADVISORY: This is an automatically generated return receipt confirmation of the facsimile transmission received by the Office. Please check to make sure that the number of pages listed as received in Total Pages above matches what was intended to be sent. Applicants are advised to retain this receipt in the unlikely event that proof of this facsimile transmission is necessary. Applicants are also advised to use the certificate of facsimile transmission procedures set forth in 37 CFR 1.8(a) and (b), 37 CFR 1.6(f). Trademark Applicants, also see the Trademark Manual of Examining Procedure (TMEP) section 306 et seq.

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Cover
Page

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01/29/03 17:16 FAX 952 563 3009		0001
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE		
In re Application of:	E. Wendell Diller	PATENT Docket No.: 0552-18077-019
Application No:	09923,272	
Filed:	August 3, 2001	
For:	ELONGATE VENTED GUN BARREL	
Examiner:	Michelle Thomson	
Group Art Unit:	3641	
BOX FEE AMENDMENT Commissioner for Patents Washington, D.C. 20231		
FACSIMILE TRANSMITTAL LETTER		
TO: Examiner Michelle Thomson FACSIMILE NO.: (703) 872-9326 GROUP ART UNIT: 3641 TOTAL NUMBER OF PAGES (including cover letter): <u>11</u>		DATE: January <u>29</u> , 2003 TIME: <u>4:15 pm</u>
Dear Examiner Thomson: Enclosed please find the following documents: 2 Pg Amendment; 1 Pg Petition for Extension of Time; 1 Pg PTO Form 2038; 1 Pg Fax Transmittal Letter. Please charge any additional fees or credit any overpayment associated with this communication to Deposit Account No. 22- 0354.		
Respectfully submitted, VICAR, ARKELL & STENGRAUS By: <u>[Signature]</u> Edwin E. Veiga II, Esq. Registration No. 26,042		
Date: January <u>29</u> , 2003 6109 Blue Circle Drive, Suite 2000 Minneapolis, MN 55443-6185 Telephone: (552) 563-3000 Facsimile: (552) 563-3001 E-Mail: eweiga@veaslow.com		
Certificate of Transmission I hereby certify that this correspondence is being facsimile transmitted to the United States Patent and Trademark Office, Fax No. (703) 872-9326, on January <u>29</u> , 2003.		
Signature: <u>Mindy Blanski</u> Mindy Blanski		
Received from 952 563 3009 at 02/03 5:11:15 PM [Eastern Standard Time]		

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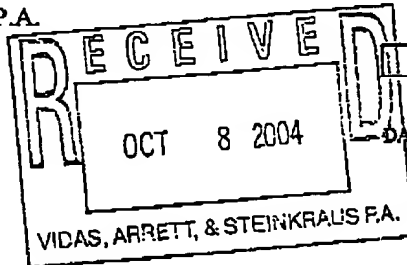
UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/923,272	08/03/2001	E. Wendell Diller	D55.2-10027	2496

490 7590 10/04/2004

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EXAMINER
THOMSON, MICHELLE R

ART UNIT	PAPER NUMBER
3641	

DATE MAILED: 10/04/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Notice of Abandonment

Application No.

09/923,272

Examiner

Michelle (Shelley) Thomson

Applicant(s)

DILLER, E. WENDELL

Art Unit

3641

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address--

This application is abandoned in view of:

1. ☒ Applicant's failure to timely file a proper reply to the Office letter mailed on 30 September 2002.
 - (a) ☐ A reply was received on _____ (with a Certificate of Mailing or Transmission dated _____), which is after the expiration of the period for reply (including a total extension of time of _____ month(s)) which expired on _____.
 - (b) ☐ A proposed reply was received on _____, but it does not constitute a proper reply under 37 CFR 1.113 (a) to the final rejection. (A proper reply under 37 CFR 1.113 to a final rejection consists only of: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114).
 - (c) ☐ A reply was received on _____ but it does not constitute a proper reply, or a bona fide attempt at a proper reply, to the non-final rejection. See 37 CFR 1.85(a) and 1.111. (See explanation in box 7 below).
 - (d) ☒ No reply has been received.
2. ☐ Applicant's failure to timely pay the required issue fee and publication fee, if applicable, within the statutory period of three months from the mailing date of the Notice of Allowance (PTOL-85).
 - (a) ☐ The issue fee and publication fee, if applicable, was received on _____ (with a Certificate of Mailing or Transmission dated _____), which is after the expiration of the statutory period for payment of the issue fee (and publication fee) set in the Notice of Allowance (PTOL-85).
 - (b) ☐ The submitted fee of \$_____ is insufficient. A balance of \$_____ is due.
The issue fee required by 37 CFR 1.18 is \$_____. The publication fee, if required by 37 CFR 1.18(d), is \$_____.
 - (c) ☐ The issue fee and publication fee, if applicable, has not been received.
3. ☐ Applicant's failure to timely file corrected drawings as required by, and within the three-month period set in, the Notice of Allowability (PTO-37).
 - (a) ☐ Proposed corrected drawings were received on _____ (with a Certificate of Mailing or Transmission dated _____), which is after the expiration of the period for reply.
 - (b) ☐ No corrected drawings have been received.
4. ☐ The letter of express abandonment which is signed by the attorney or agent of record, the assignee of the entire interest, or all of the applicants.
5. ☐ The letter of express abandonment which is signed by an attorney or agent (acting in a representative capacity under 37 CFR 1.34(a)) upon the filing of a continuing application.
6. ☐ The decision by the Board of Patent Appeals and Interference rendered on _____ and because the period for seeking court review of the decision has expired and there are no allowed claims.
7. ☐ The reason(s) below:

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SUPERVISOR PATENT EXAMINER

Petitions to revive under 37 CFR 1.137(a) or (b), or requests to withdraw the holding of abandonment under 37 CFR 1.181, should be promptly filed to minimize any negative effects on patent term.

U.S. Patent and Trademark Office
PTOL-1432 (Rev. 04-01)

Notice of Abandonment

Part of Paper No. 7